

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-CV-2090

Brian BROCKHAUSEN, Allen TONER and Larry COOK

Plaintiffs,

v.

CITY OF ENGLEWOOD,

Defendant.

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**CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND PROSPECTIVE  
INJUNCTIVE RELIEF**

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The Plaintiffs, by and through their attorney, Alison Ruttenberg, hereby complain against the Defendant as follows.

1. In this action, Plaintiffs challenge the City of Englewood's Sex Offender Residency Restriction, codified at ENGLEWOOD, COLO., CODE § 7-3-1 (2000) et seq. ("ESORR" or "Residency Restriction"), which makes it a crime for them to live in their Englewood homes. The Residency Restriction: (a) is tantamount to banishment from the City in violation of the Fifth Amendment to the federal constitution; (b) constitutes a new, after-the-fact punishment that violates the Ex Post Facto Clauses of the federal constitution (U.S. CONST. art. I, § 10 ;

and (c) deprives Plaintiffs of liberty without due process, in violation of the Fourteenth Amendment to the United States Constitution.

2. The Plaintiffs are all registered sex offenders residing in the City of Englewood. The City of Englewood Council enacted ESORR based on the public hysteria against sex offenders without regard to actual facts. When it passed ESORR, the City Council believed that sex offenders had a 100% recidivism rate, that sex offenders were poor derelicts who would be homeless and prey on the children of Englewood and that all sex offenders are violent predators who place children at risk. Those assumptions are patently false and unsupported by any facts or peer reviewed scientific research. All three Plaintiffs are in treatment, doing well in treatment, are low risk to the community and there is no objective evidence that they pose a risk to children greater than any other person residing in the City of Englewood. The recidivism rate for sex offenders who are successful in treatment is less than 1%. This is in contrast to the recidivism rate for other convicted felons, whose recidivism rate can be as high as 40% for felonies such as assault, drug offenses and burglary. Despite these actual facts, the City of Englewood has singled out sex offenders for banishment, and allows convicted and paroled murderers, people convicted of child abuse and neglect, arsonists, drug dealers, burglars, robbers, extortionists, habitual criminals and other violent felons to reside wherever they want to within the City of Englewood. These other types of felons are hundreds of times more likely to harm a child in the City of Englewood than the Plaintiffs. Banishment is cruel and unusual punishment; it takes away the Plaintiffs' right to travel; and it is arguably

a form of double jeopardy. ESORR could lead to a dance of the lemons, as each municipality tries to turn its neighbor City into a prison colony, thereby avoiding the expense of imprisonment.

3. The Plaintiffs seek declaratory relief under 42 U.S.C. §1983. In addition, they seek an injunction pursuant to 42 U.S.C. §1983 prohibiting Defendant, and all persons and entities acting under its direction or on its behalf, from taking any further actions to enforce the Residency Restriction, including but not limited to, enjoining the City of Englewood from prosecuting Plaintiffs for violating the ESORR and from taking any other action to enforce the ESORR or to exclude Plaintiffs from living in the place of their choosing in Englewood. Finally, the Plaintiffs seek their reasonable attorneys' fees and costs under 42 U.S.C. §1988.

### **JURISDICTION OF THE COURT**

4. This action arises under the Constitution and laws of the United States and is brought pursuant to Title 42 USC §1983. Jurisdiction is conferred on this Court pursuant to Title 28 USC §1331. Jurisdiction supporting the Plaintiffs' claim for attorney fees and costs is conferred by 42 USC §1988.

5. Venue is proper in the District of Colorado pursuant to 28 USC §1391(b). All of the events relevant to the claims set forth in this Complaint occurred within the state of Colorado, Arapahoe County.

### **PARTIES**

6. Brian Brockhausen has been a resident of the City of Englewood since he moved here with his family in 1988. Except for when he was in prison

or a Shared Living Arrangement (“SLA”) at the direction of his probation officer, he has physically lived in his family home at the same address in Englewood. The family residence has continuously been his mailing address and home of record since 1988. He currently resides at that address with his disabled brother Matt who is unable to work because of kidney disease. Brian is Matt’s caretaker and sole provider, he always assists Matt after his numerous surgeries and Matt has no place to go and nobody to take care of him if Brian is banished. Brian also cares for the brothers’ elderly parents who may also be forced to sell their property and move if their son Brian is banished.

7. Allen Toner has lived in Englewood since he paroled in 2014 after serving a 12 year prison sentence. He married in June 2016 and his wife is pregnant. They cannot find another place to move that they can afford. Mrs. Toner has been so stressed out over having to move that she has been to the Emergency Room two times in the last month. She had to undergo an ultrasound to make sure that the baby still had a heartbeat and then two weeks later was rushed to the Emergency Room again for bleeding. The stress she has gone through trying to find a place to live outside of Englewood has been too much to take. Unless the Toners live in a one bedroom apartment next to schools and parks in the Thornton and Westminster area (which will be prohibited by Mr. Toner’s parole officer), they are unable to find anything that is comparable to where they live right now in Englewood. They will have to rent a storage unit for most of their belongings and live in a one bedroom for about \$1300 per month. The amount of money that will need to be spent on gas and

wear and tear on both vehicles, plus the added expense of a storage unit will leave them in financial distress. The City of Englewood sanctimoniously declares that ESORR is necessary to “protect” children, but the only actual effect it has had so far on an actual child is the near loss of life of the Toner baby.

8. Defendant City of Englewood is a political subdivision of the State of Colorado located within the Denver Metropolitan area. Englewood is a home-rule city that was incorporated in 1903; its City Charter was adopted in 1958. With regard to all actions described in this Complaint, Defendant acted and is threatening to act under color of state and local law.

#### **FACTUAL BACKGROUND**

9. Brian Brockhausen moved to Englewood with his family in 1988 when he was 11 years old. He is a victim of sex assault when he was ages six through nine. In 1999 and 2000 he was charged with sex assault on teenaged boys, under the age of consent. He has two separate cases and three victims. He was sentenced to 20 years to life probation. He was directed to live in a sex offender SLA in Denver, had to register as a sex offender at that address in Denver, and the Denver police directed him to change his address on his driver's license to match the address of his registration. In March 2004, his probation was revoked for technical violations and he was resentenced to 10 years to life in prison. He completed the entire Phase I and II of the sex offender treatment while in prison, and was then in the therapeutic community almost four years prior to his parole in March 2014. When he paroled, he moved back to his family residence in Englewood and registered as a sex offender. He was directed to

reaccomplish the entire sex offense treatment program by his parole officer, and he successfully completed treatment and is in their aftercare program. He has been gainfully employed since his parole, is well liked by his bosses and coworkers, is well liked and trusted by his neighbors and has never been accused of sexually inappropriate conduct or a sex offense since 2001.

10. Mr. Brockhausen has never been designated by the parole board or a court as a sexually violent predator (SVP). However, the City of Englewood Pro Tem Mayor, Rick Gillit, libelously and repeatedly has referred to Mr. Brockhausen during City Council meetings as a SVP, for example on August 9, 2016. On August 16, 2016, Gillit informed the Council that all the parents of elementary school children in Mr. Brockhausen's neighborhood would or should be notified of Mr. Brockhausen's sex offender status and address. Only actual SVPs undergo community notification, and Mr. Brockhausen is not a SVP. Gillit is singling out Mr. Brockhausen for special retaliatory treatment after Mr. Brockhausen contacted City Council members who were sympathetic toward him. Two City Council members tried to pass a resolution on August 15, 2016 for a moratorium on enforcement of ESORR, but the resolution failed 5-2. Now Gillit is singling out Mr. Brockhausen for special retaliatory treatment. No parents of children in Englewood are notified of child abusers, offenders who have felony convictions for assault or homicide, arsonists, burglars, drug dealers or other paroled violent offenders who live in the neighborhood. Instead, the parents will only be notified about Mr. Brockhausen. This puts Mr. Brockhausen and his

family at risk of being harmed by vigilantes. Across the country, vigilantes have been burning the homes of sex offenders or just murdering them outright.

11. Allen Toner was also paroled in 2014, and is in sex offender treatment and progressing without incident. He is doing well in treatment, and is allowed to have contact with minor family members and will be allowed to have contact with his baby when the baby is born. He was sentenced in February 2004 to ten years to life for sex assault. He has not been accused of sexually inappropriate or criminal behavior since committing his offense in July 2003.

12. Larry Cook was convicted in 2012 of sexual exploitation of a child after computers he was repairing at his computer repair business were found to have child pornography on their hard drives and located in peer to peer share folders that enable other people on the same peer to peer network to download the illegal files when the computer devices are connected to the internet. Mr. Cook has no actual victims that he touched or otherwise interacted with. Mr. Cook is 66 years old and has never been accused at any other time of any sexually inappropriate or criminal conduct. Mr. Cook has lived with his wife in the home that they own in Englewood since 1990. Mr. Cook continuously lived at that address until August 16, 2016 when he had to move to a half way house, Arapahoe County Treatment Center, 3265 W Girard Ave, Englewood, CO 80110, as per the sentence of the Arapahoe County District Court. From 2012-August 16, 2016 Mr. Cook was registered at his home address. Now he will have to reregister at the address of the halfway house until he is

released back into the community for community supervision at the end of the year.

13. The City of Englewood Chief of Police has determined that none of the Plaintiffs fall into the grandfather clause exception to ESORR because they have not continuously resided at the same address in Englewood since before passage of the Ordinance in October 2006. All three Plaintiffs were informed by the Englewood Police Department that they will not be allowed to register in the City of Englewood again, and that they will be sent a certified letter instructing them that they have 30 days to clear out of the City of Englewood or be arrested. At the August 15, 2016 City Council meeting, the Council members who were sponsoring the moratorium were attempting to delay sending these letters for at least six months. However, since the resolution did not pass, Rick Gillit and the Chief of Police have announced their intention to start mailing these 30 day letters within the next couple of weeks. At this meeting, Rick Gillit again singled out Mr. Brockhausen for special ridicule and retaliatory behavior for Mr. Brockhausen's exercise of his First Amendment right to petition his elected officials for redress. Gillit even quipped that it "sucks" for him [Mr. Brockhausen], but "rules usually do."

14. The "rules" also apply to the City of Englewood – in this case the United States Constitution. On October 18, 2006, the Englewood City Council enacted its unconstitutional sex offender residency restriction, ENGLEWOOD,

COLO., ORDINANCE 06-34, § 1, based on a finding that “sexual predators and the specified sex offenders who use physical violence or who prey on children present an extreme threat to public safety.” ENGLEWOOD, COLO., CODE § 7-3-1. The Residency Restriction applies to all three Plaintiffs because they have all been convicted of a felony for an offense requiring registration pursuant to CRS 16-22-108. ESORR at section 7-3-3(A)(i). The “prey on children” finding is as a result of the widespread but ignorantly propagated myth that sex offenders are “pedophiles.” None of the Plaintiffs meet the clinical definition of a pedophile. Drug offenders in the City of Englewood are many times more likely to “prey” on the children of Englewood than the Plaintiffs or 99% of the other sex offenders who are living in Englewood, paying their taxes, and quietly going about their business without incident. Additionally, sex offenders who lived in closer proximity to schools and daycares are not more likely to reoffend than those who lived farther away. Paul A. Zanderbergen et al., Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism, 37 CRIM. JUSTICE & BEHAVIOR 482, 498 (2010).

15. In 2012 the City of Englewood suspended enforcement of ESORR in response to a lawsuit, *Ryals v. City of Englewood*, 12-cv-2178-RBJ. This lawsuit was filed in Arapahoe County District Court and removed to United States District Court by the City of Englewood. In this lawsuit, Mr. Ryals sought declaratory and injunctive relief on the theory that ESORR was unconstitutional pursuant to both the Colorado state and United States Constitutions. On August 13, 2013, Judge Jackson, United States District Court, ruled that ESORR

violated Article XX Section 6 of the Colorado Constitution and granted the requested relief. It is important to note that Judge Jackson did not issue any ruling on any other theory that the Ordinance was unconstitutional, nor did the City of Englewood request that ruling. There has been no judicial determination or order that ESORR does *not* violate the United States Constitution. The City of Englewood appealed to the Tenth Circuit Court of Appeals, and the Tenth Circuit Court of Appeals certified the question of whether Article XX Section 6 of the Colorado Constitution preempted ESORR to the Colorado Supreme Court. In January 2016, the Colorado Supreme Court ruled that Article XX Section 6 of the Colorado Constitution did *not* preempt ESORR and therefore ESORR was *not* unconstitutional pursuant to the Colorado State Constitution. The case was remanded back to Judge Jackson. At that time, Judge Jackson would have held hearings and issued findings of fact and conclusions of law on the other legal arguments advanced by Mr. Ryals. However instead, the case was dismissed because it became moot when Mr. Ryals petitioned off the Colorado state registry and therefore ESORR no longer applies to him. The City of Englewood officials (including the pro tem Mayor and interim City Attorney) wrongfully have concluded that ESORR is bullet proof and has been upheld by the Colorado Supreme Court and that they can enforce it without fear of judicial interference. That is incorrect. The only judicial determination that has been made is that Article XX Section 6 of the Colorado Constitution did *not* preempt ESORR. The Plaintiffs in the case at bar seek injunctive and declaratory relief because ESORR violates the United States Constitution – an issue that was left

undecided by the *Ryals v. City of Englewood* cases in the federal courts and the Colorado Supreme Court.

**FIRST CLAIM FOR RELIEF**  
**(Taking of property in violation of the Fifth Amendment to the United States Constitution as applied to Larry Cook)**

16. In *Mann v. Georgia Department of Corrections*, 653 S.E.2d 740 (Ga. 2007), the Georgia Supreme Court ruled that the Georgia statute prohibiting sex offenders from residing at certain addresses in the state of Georgia was an unconstitutional taking of private property in violation of the Fifth Amendment. The same analysis applies to the case at bar with respect to Plaintiff Larry Cook who has owned his home in the City of Englewood since 1990.

17. It is apparent that there is no place in Englewood where a registered sex offender can live without being continually at risk of being ejected. Even if a sex offender complies with the residence restrictions, he has no control over whether a third party may open a day care center, recreation center or swimming pools. Additionally, even though there are technically some addresses in Englewood that do not fall within ESORR, the number of parcels available to sex offenders is 55 unrestricted parcels out of 11,314 parcels total in the City of Englewood. Therefore, approximately 99% of the City is off limits to the Plaintiffs. All the Plaintiffs have been warned by the Englewood police that they will not be allowed to reregister in the City of Englewood and will shortly receive letters directing that they vacate the City of Englewood within 30 days. Even if Mr. Cook is allowed to remain at the Arapahoe Community Treatment Center in Englewood, when he completes the in-resident phase of the Community

Corrections program after 3-6 months, he will not be allowed to reside at the home he has owned since 1990. The police department handout provided to sex offenders warns that if they “choose to contact the occupant who lives in a non shaded area [restricted area] not posted for rent/sale [they] may be contacted by police, and could potentially be charged with trespassing.”

18. Mr. Cook and his wife did not purchase their home in 1990 for rental purposes and neither one of them are real estate speculators. They raised children in that house, and they have gardens and other personal uses of this property that cannot be replaced. Forcing the Cooks to become lessors would be unwelcomed and an unanticipated role for which they are ill-equipped. Sale of their home, if a purchaser can be found, will involve numerous expenses, such as closing costs, attorney fees and realtor commissions, and appellant would face those costs again, plus additional expenditures such as escrow deposits and utilities transfers, in purchasing a new residence in another City.

19. ESORR constitutes an unconstitutional regulatory taking of Mr. Cook’s property. ESORR, by prohibiting Mr. Cook from residing at his home with his wife utterly impacts his use of his property as the home he shares with his wife. ESORR strips Mr. Cook of his right to possess, use, and to enjoy his property. Mr. Cook is entitled to declaratory and injunctive relief under 42 U.S.C. § 1983 and reasonable attorneys’ fees and costs under 42 U.S.C. § 1988

**SECOND CLAIM FOR RELIEF  
(Ex Post Facto Clause, Article I, Section 10 of the United States  
Constitution as applied to Allen Toner and Brian Brockhausen)**

20. The United States Constitution prohibits ex post facto laws. U.S.

CONST. art. I, § 9. A law that “makes more burdensome the punishment for a crime after its commission” is an impermissible ex post facto law. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925)).

21. Mr. Toner and Mr. Brockhausen were not sentenced to banishment as part of their punishment and sentences.

22. ESORR was enacted in 2006, after Mr. Toner and Mr. Brockhausen committed their offenses.

23. Because the ESORR effectively banishes Mr. Brockhausen and Mr. Toner from residing in Englewood, where they own property and want to live, the restriction imposes an additional punishment on them that was not prescribed when they committed their offenses.

24. As a result, the ESORR is an ex post facto law as applied to Mr. Brockhausen and Mr. Toner.

25. The City of Englewood has, by the ESORR, deprived Mr. Brockhausen and Mr. Toner of their constitutional right to be free from ex post facto laws.

25. Mr. Brockhausen and Mr. Toner are entitled to declaratory and injunctive relief under 42 U.S.C. §1983 and reasonable attorneys’ fees and costs under 42 U.S.C. §1988.

**THIRD CLAIM FOR RELIEF**  
**(Due Process under the Fourteenth Amendment of the United States**  
**Constitution as applied to all Plaintiffs)**

26. The Fourteenth Amendment to the United States Constitution prohibits state and local governments from “[depriving] any person of life, liberty,

or property without due process of law.” U.S. CONST. amend. XIV, § 1.

27. The ESORR effectively banishes the Plaintiffs from the City of Englewood, where he has chosen to live and purchased a home, which is a deprivation of the liberty secured to him by the Fourteenth Amendment.

28. The ESORR is not rationally related to any legitimate government interest the City of Englewood has in protecting public health, safety, and welfare. Rather, it panders to the public stereotype that all sex offenders are violent predators who target children and can never be rehabilitated.

29. As a result, the ESORR deprives Mr. Ryals of liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

30 The Plaintiffs are entitled to declaratory and injunctive relief under 42 U.S.C. §1983 and reasonable attorneys’ fees and costs under 42 U.S.C. §1988.

**WHEREFORE**, the Plaintiffs respectfully request that this Court:

A. Declare that the Englewood Sex Offender Residency Restriction constitutes a new, after-the-fact punishment that violates the Ex Post Facto Clauses of the federal and state constitutions (U.S. CONST. art. I, § 10);

B. Declare that the Englewood Sex Offender Residency Restriction constitutes an unconstitutional taking of Mr. Cook’s private property;

C. Declare that the Englewood Sex Offender Residency Restriction deprives Plaintiffs of liberty without due process, in violation of the Fourteenth Amendment to the United States Constitution;

D. Enter a permanent injunction prohibiting Defendant, and all persons and entities acting under its direction or on its behalf, from taking any further actions to enforce the Residency Restriction, including but not limited to, enjoining the City of Englewood from prosecuting Plaintiff for violating the ESORR; and enjoining the City of Englewood from taking any other action to enforce the ESORR or to exclude Plaintiffs from living in the place of their choosing in Englewood;

E. Award Plaintiffs their attorneys' fees, expenses, and costs incurred in bringing this lawsuit; and

F. Order such other and further relief as this Court may deem just and appropriate.

DATED August 18, 2016.

Respectfully submitted,

/s/ Alison Ruttenberg

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